October 19, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007

RE: Plaintiffs' letter-motion for partial exclusion of opinion testimony by Dr. John Abowd in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

Pursuant to Rule 3(I) of this Court's Individual Rules and Practices, Fed. R. Evid. 702, 703, and 705, and Fed. R. Civ. P. 26 and 37, Plaintiffs move to exclude in part the expected trial testimony of Defendants' expert witness, Dr. John Abowd.[1] Plaintiffs do not seek to exclude the bulk of Dr. Abowd's opinion testimony. However, Dr. Abowd should be barred from testifying to (1) opinions not contained in his September 21 expert disclosure, and (2) opinions supported by underlying facts or data that have never been disclosed or produced. Defendants' nondisclosure in the discrete areas identified below has prejudiced Plaintiffs' ability to examine the bases for, and respond to, Dr. Abowd's potential testimony.

On September 21, Defendants produced as their sole expert disclosure in this matter a 24-page report by Dr. Abowd, the Census Bureau's Chief Scientist. On September 22, Plaintiffs advised that the expert disclosure failed to comply with Rule 26 because, *inter alia*, it failed to disclose facts or analysis underlying many of Dr. Abowd's opinions. Ex. 1. After Plaintiffs requested immediate production of all documents considered by Dr. Abowd in developing his opinions, Ex. 2, Defendants agreed to "produce the material relied upon or considered by Dr. Abowd in preparing his expert report." Ex. 3. On October 5, Defendants produced ten documents and represented that they were the "[d]ocuments considered by Dr. Abowd." Ex. 4.[2]

Plaintiffs deposed Dr. Abowd regarding his expert disclosure on October 12. During that deposition, Dr. Abowd expressed extensive opinions that were not disclosed in his September 21 report, and testified that in forming those opinions he considered materials and evidence (including internal Census Bureau data and analysis) that were not among the ten documents produced the week before and have not otherwise been produced in discovery.

1. Dr. Abowd should be precluded from testifying about opinions not disclosed in his September 21 report. Dr. Abowd should be barred from testifying at trial regarding his opinions

[1] Per Rule 3(A) and Rule 3(I) (Motions to Exclude Testimony of Experts) of this Court's Individual Rules, Plaintiffs are filing this motion by the October 19 deadline for dispositive motions (*see* Docket No. 363). If the Court prefers to treat this motion as a motion *in limine* under Rule 5(B)(i) of the Court's Individual Rules, Plaintiffs are prepared to refile this request consistent with Rule 5(B)(i) and Rule 3(D) by the October 26 deadline for motions *in limine*.

[2] On October 1, Defendants also produced a revised version of Dr. Abowd's report indicating that it reflected the "materials relied upon by Dr. Abowd in producing his expert report." Defendants clawed back that report on October 5 on a claim of inadvertent disclosure and work-product privilege. Ex. 4. As required by Docket No. 296, Plaintiffs have treated this report in accordance with Rule 26(b)(5)(B).

as to Plaintiffs' experts where those opinions were not disclosed in his September 21 report. Rule 26 requires that an expert must disclose "a complete statement of all opinions the witness will express." Fed. R. Civ. P. 26(a)(2)(B)(i). Rule 26(a)(2)(C), under which Defendants offer Dr. Abowd's testimony, similarly requires experts to disclose the "opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C)(ii).

Dr. Abowd's report does not specifically discuss any of plaintiffs' ten experts. Notwithstanding this omission, during his deposition, Dr. Abowd testified that, if asked, he intended to testify about criticisms of five of plaintiffs' experts: Hermann Habermann (3 points of disagreement), John Thompson (4 points), Joseph Salvo (4 points), William O'Hare (15 points), and Matthew Barreto (35 points). While several of these criticisms are non-substantive or consistent with Dr. Abowd's disclosed analysis of the Census Bureau's "non-response follow up" measures,[3] his material criticisms were not disclosed in his September 21 report or in any supplemental disclosure.

Rule 37(c)(1) provides that if a party fails to disclose information required by Rule 26(a) or (e), "the party is not allowed to use that information" at trial "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). There is no reasonable argument that Defendants' failure to disclose these opinions was substantially justified; Dr. Abowd testified that this was deliberate decision . Ex. 5 (Abowd 10/12 Tr. at 96) ("I didn't specifically discuss anything about Dr. Barreto's report when I wrote . . . , I hadn't even read it. . . . I didn't feel I needed to comment specifically on his report."). And the omission of these opinions was not harmless: Plaintiffs had to spend almost half of Dr. Abowd's expert deposition eliciting his views; had no notice to be able to prepare an examination to test those views; and had no opportunity to seek remedial relief given the calendar in this case.[4] Under these circumstances, Plaintiffs will be prejudiced if Dr. Abowd's undisclosed opinions critiquing Plaintiffs' experts are permitted at trial, and exclusion of these opinions from Dr. Abowd's testimony is warranted under Rule 37(c)(1). *See, e.g., Point Prods. A.G. v. Sony Music Entm't, Inc.*, No. 93 Civ. 4001 (NRB), 2004 WL 345551, at *9-*13 (S.D.N.Y. Feb. 23, 2004) (excluding expert testimony regarding previously undisclosed opinions); *Innis Arden Golf Club v. Pitney Bowes, Inc.*, No. 3:06-cv-1352 (JBA), 2009 WL 5873112, *3 (D. Conn. 2009) ("Rule 37(c)(1)'s preclusionary sanction is automatic absent a determination of either substantial justification or harmlessness.") (citation omitted).

In addition, Dr. Abowd should be precluded from offering his undisclosed opinion testimony regarding Dr. Barreto's survey methodology. The Federal Rules of Evidence permit expert testimony where it is "based on sufficient facts or data." Fed. R. Evid. 702(b). But Dr. Abowd's deposition testimony about Dr. Barreto's methodology was made without considering the underlying data and materials that Dr. Barreto produced with his report. Ex. 5 (Abowd 10/12

[3] "Non-response follow up" ("NRFU") refers to the operations the Census Bureau conducts for individuals who do not voluntarily "self-respond" to the census questionnaire. A central point of disagreement between Dr. Abowd and Plaintiffs' experts is whether the mechanisms that the Census Bureau employs in its effort to obtain a complete count of non-responsive households – including NRFU, the use of administrative records, and imputation – will mitigate or instead exacerbate differential undercounts in a manner that will harm the Plaintiffs.

[4] Defendants agreed to make Dr. Abowd available for his expert deposition on only a single day – the last day of discovery on October 12 – despite Plaintiffs' request that he be made available in September. *See* Ex. 1.

Tr. at 68-69). And Dr. Abowd's failure to consider Dr. Barreto's underlying materials resulted in an incorrect understanding of Dr. Barreto's analysis; for example, Dr. Abowd questioned the sufficiency of Dr. Barreto's sample because he mistakenly believed the number of interviews *completed* (over six thousand) was instead the number *attempted*. Ex. 5 (Abowd 10/12 Tr. at 68-69). He further mistakenly believed that Dr. Barreto failed to provide margins of error for the data discussed in his report. Ex. 5 (Abowd 10/12 Tr. at 69). Criticizing another expert without having reviewed that expert's supporting materials is not a "reliable principle or method" under Fed. R. Evid. 702(c).

2. Dr. Abowd should be precluded from offering opinion testimony where the underlying facts or data have not been disclosed. Dr. Abowd's testimony regarding three discrete additional issues should be barred for failure to timely or adequately disclose underlying facts or data he considered in forming his opinions. Defendants initially took the position that "Plaintiffs are not entitled to the materials relied upon by Dr. Abowd because his report was designated under Rule 26(a)(2)(C), not (B)." Ex. 6. Defendants subsequently agreed (after Plaintiffs indicated they were prepared to compel disclosure) to provide the "material relied upon or considered by" Dr. Abowd. Ex. 3. Courts have routinely compelled such disclosure from Rule 26(a)(2)(C) witnesses because without such disclosure the opposing side "may be unable to test sufficiently the expert's opinion during deposition and suffer unfairly from this handicap at trial." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 21-mc-102, 2014 WL 5757713, at *5 (S.D.N.Y. Nov. 5, 2014); *Robinson v. Suffolk Cty. Police Dep't*, No. 08-cv-1874, 2011 WL 4916709, at *1 (E.D.N.Y. Oct. 17, 2011).

a. Imputation: Dr. Abowd's report discusses that at the end of NRFU operations, if the Census Bureau is not able to collect information on an occupied address, it will "impute" the count of the number of people at the address. Dr. Abowd's report states that "the Census Bureau is not aware of any credible quantitative data suggesting that imputation in the census leads to a greater net undercount or differential net undercount in comparison to self-response or in-person interviews." Although Plaintiffs propounded discovery seeking all analyses and data regarding undercounted and hard-to-count populations, Defendants did not produce any such materials in discovery. In conjunction with their October 5 production of materials considered by Dr. Abowd, Defendants produced a single, heavily redacted report evaluating use of imputation during the 2010 census, referred to as "Memo J-12." On its face, Memo J-12 does not evaluate whether the imputation process mitigates or exacerbates undercount. At deposition, Dr. Abowd acknowledged that the Census Bureau had done further evaluation of imputation, and that Memo J-12 was one of a series of analyses addressing that topic. Ex. 5 (Abowd 10/12 Tr. at 269-270, 274-275, 277-283). Dr. Abowd conceded at deposition that he had reviewed this series of memos, and acknowledged that in order to opine whether the "Census Bureau is . . . aware" whether the imputation process exacerbates or mitigates bias, he had to have considered these memos.

Defendants have generally asserted that the imputation analysis is confidential and cannot be disclosed pursuant to Title 13 of the U.S. Code. But having invoked Title 13 as a shield to bar production of imputation materials in this case, Defendants cannot selectively use the imputation analysis as a sword to have Dr. Abowd testify that the Census Bureau's imputation methodology may cure any remaining undercount at the end of the NRFU process. *See, e.g., In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008). Because Plaintiffs' experts have not been

provided access to the data and analysis the Census Bureau has conducted on imputation, Dr. Abowd should be barred from expressing an opinion regarding the Census Bureau's imputation methodology.

b. Analysis of the 2018 End-to-End Test: At several points in his report and during his deposition testimony, Dr. Abowd opined that the Census Bureau's ability to run a successful NRFU operation was demonstrated by the 2018 End-to-End test in Providence, Rhode Island. *See, e.g.*, Ex. 5 (Abowd Tr. at 89-91). Although Plaintiffs requested discovery concerning all End-to-End testing, Defendants produced nothing in discovery, and the materials disclosed with Dr. Abowd's expert report contains nothing on the End-to-End test. From both his report and his testimony, it is clear that Dr. Abowd has access to substantial data and analysis conducted by the Census Bureau concerning the End-to-End test. Ex. 5 (Abowd 10/12 Tr. at 77-78, 89-91, 122, 307-08). Because the Census Bureau's analysis and data regarding the End-to-End test have not been produced, Dr. Abowd should be barred from providing opinions about or based on the 2018 End-to-End test.

c. 1970 Hispanic Origin Question: Dr. Abowd's report cites the adoption of a question about Hispanic origin on the 1970 long form census as an example why testing was not required. Plaintiffs specifically requested this backup information, Ex. 2 (attach. A), but nothing was produced in discovery. Dr. Abowd's report does not cite any source for this information, and he had considerable difficulty identifying the source during his deposition. Ex. 5 (Abowd 10/12 Tr. at 143-47). Because Dr. Abowd's report failed to adequately disclose the basis for this analysis, and because Plaintiffs' ability to examine Dr. Abowd about this analysis was therefore hampered, he should be barred from providing opinions about or based on the 1970 example.

Respectfully submitted,

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